

## **AIR QUALITY PERMIT APPEAL PROCESS MEETING - SUMMARY**

**Monday, January 7, 2002 - 10 a.m. to 2:30 p.m.**

**Room 111, Metcalf Bldg.**

**Persons attending:** Don Vidrine, Dave Klemp, Charles Homer and Jan Brown, *DEQ/AWMB*; Don Quander, *Holland & Hart*; Jerry Driscoll, *AFL-CIO*; Nicole Prokop, *Holcim*; Lisa Graham, *Smurfit-Stone*; Dexter Busby, *Montana Refining*; Jack Tuholske and Anne Hedges, *Montana Environmental Information Center*; Sarah Merrill and Jennifer Swearingen, *Montanans Against Toxic Burning*; Hal Robbins, *Bison Engineering*; and Gail Abercrombie, *Montana Petroleum Assn.*

The Western Environmental Trade Association (WETA) and the AFL-CIO submitted letters to the Board of Environmental Review (BER) at its November 16, 2001 meeting expressing concern with the air quality permit appeal process. In addition, WETA submitted a proposal suggesting ways the BER could expedite the air quality permit appeal process. The Department of Environmental Quality formed a work group to discuss the WETA proposal and prepared this summary of the issues discussed at a meeting held on January 7, 2002. The summary describes the issues and indicates areas of consensus and areas of disagreement between proponents and opponents of the WETA proposal.

**Basic Issue:** *Does the air quality permit appeal process need to be changed to provide for a more timely conclusion of the appeal process?*

### **Areas of Consensus:**

- It is appropriate for the BER to establish procedures for consideration of air quality permit appeals to more efficiently bring appeals to timely conclusion.
- BER should set a reasonable target date by which they would intend to conclude the appeal.

### **Areas of Disagreement:**

#### **Proponents' Positions:**

- The appeal procedure acts as a preliminary injunction, giving the appellant an automatic stay without meeting the normal standards the court would require before granting a stay. Creation of this stay would require the BER to then conclude the appeal in a timely manner.
- The legislature has established a policy that air quality permit decisions be made in a timely manner. The statutory requirement that DEQ act on a completed air permit application within 60 days of its submittal was cited as evidence of this.
- Once the appeal process is initiated, there are no requirements for timely resolution.
- Recent air quality permit appeals have demonstrated that the BER needs to establish procedures that will ensure timely conclusion of appeals.
- It is necessary to establish, at the beginning of the process, a specific deadline (120 days) by which the appeal will be concluded.

- Intermediate deadlines for motions, discovery, etc. must be set to meet the final deadline.
- 120 days is sufficient time for the appeal process, since that is twice the time the DEQ has to act on a complete permit application.
- The appellant must identify the issues that are part of the appeal and be bound by those issues early in the process in order to define the scope of the proceeding.
- Issues that can be considered by the BER as part of the appeal would be limited early in the process.
- It is necessary to limit the scope of the proceeding in order to ensure timely conclusion of the appeal.
- Most, if not all, of the suggested changes can be made through issuance of a standing order by the BER, or possibly through rulemaking, and would not require statutory changes.
- If the changes are made through an administrative process, such as a standing order, the BER may allow deviations from these procedures.

#### **Opponents' Positions:**

- The small number of lengthy permit appeals do not constitute a serious enough problem for the BER to implement changes that tie the hands of the public early in the appeal process.
- The appeal process is the due process equivalent of a trial.
- In an administrative appeal process, the district court acts as an appellate court.
- Limiting issues at the beginning of an appeal process limits them all the way through district court.
- It is not realistic for an attorney representing the public to identify all of the relevant issues within 30 days of the DEQ's decision on the permit. This would only allow 15 days to review a final permit and file an appeal, and 15 additional days to identify the issues and file the documents that will limit the rest of the process.
- The proposed 15-day time limit for identifying all issues of the appeal is not fair to appellants, since the DEQ and the permit applicant have had access to the information for months or years.
- The discovery process is intended for the exchange of information and is necessary to identify relevant issues.
- The Rules of Civil Procedure allow amendments to original proceedings at all stages.
- It is necessary to prohibit construction until the appeal decision is made in order to protect people's health.

#### **COMMENTS ON THE SPECIFIC SECTIONS OF THE PROPOSAL ARE SUMMARIZED AS FOLLOWS:**

**Issue:** *Should the applicant be deemed a party without special intervention?*

#### **Areas of Consensus:**

- There should not be any roadblocks to the applicant becoming a party in an appeal.

- There should be an “opt out” provision for those applicants who don’t want to be a party.
- BER should notify the applicant of any appeal and request notification if the applicant does not want to be a party.

**Areas of Disagreement:** None.

**Issue:** *Should issues be limited to the appeal as filed? The appeal would be limited by the petitioner’s disclosure statement and no amendments to the appeal would be allowed.*

**Areas of Consensus:** None.

**Areas of Disagreement:**

**Proponents’ Position:**

- Since the filing of the appeal immediately stops a project, citizen groups ought to identify their concerns and explain the basis for causing a delay in the projects.

**Opponents’ Positions:**

- Suggested time frames for disclosure are too short to adequately identify all relevant issues.
- Limiting the appeal to issues in the discovery statement as filed will not allow the BER to consider all relevant issues.
- Since complicated scientific issues are involved, not allowing amendment of the appeal forecloses the opportunity for citizen groups to get expert advice.
- It is difficult for lay people to understand the law, the regulations and the scientific issues involved, and 15 days does not allow sufficient time to produce a binding disclosure statement.

**Issue:** *Should the BER recognize their jurisdictional exclusion from MEPA appeals?*

**Area of Consensus:**

- The BER should consider this issue and, with input from the department and its own legal staff, establish a policy on how to handle appeals based on MEPA issues.

**Areas of Disagreement:** None.

**Issue:** *Should the BER establish a policy that recognizes permitting is separate from past compliance?*

**Area of Consensus:**

- The department can consider past compliance history when conditioning a permit.

**Areas of Disagreement:****Proponents' Positions:**

- Past compliance history or current compliance status should not be a basis for denying a permit.

**Opponents' Positions:**

- Compliance is integral to public safety and it can't be disconnected from the permitting process.
- If past non-compliance indicates that a facility will not be able to meet a standard if the facility were to receive a new permit, DEQ must have the authority to either condition or deny the permit as necessary to protect the standard.

**Issue:** *Should a petitioner disclosure statement be required within 15 days of submittal of the appeal?*

**Areas of Consensus:**

- Disclosure statements are acceptable since they are currently required.

**Areas of Disagreement:****Proponents' Positions:**

- The appellant must completely define the issues in the beginning of the process in order for the appeal process to be completed in a timely manner.

**Opponents' Position:**

- The time frame of 15 days is too short to provide all of the requested information, particularly if the appellant is going to be limited to witnesses, evidence, issues, etc. identified in this disclosure.
- Rulemaking would be necessary in order to require a binding disclosure statement.

**Issue:** *Should there be specific binding information requirements for the pre-hearing disclosure, and should the appellant be limited to only those issues?*

**Area of Consensus:**

- The information requested in disclosure statement was not entirely unreasonable. (The group did not discuss the specifics of the proposed disclosure statement in detail.)

**Areas of Disagreement:****Proponents' Position:**

- The appellant must be bound by the issues described in the disclosure statement in order to have a clearly defined appeal that can be decided in a timely manner

**Opponents' Position:**

- It is not possible for a member of the public with limited expertise and limited access to relevant information to adequately identify all relevant issues within the limited time proposed (15 days).
- The appellant should be able to amend or supplement the disclosure statement.

**Issue:** *Should the petitioner, as part of its pre-hearing disclosure, state in detail the relief requested as a result of the appeal?*

**Areas of Consensus:**

- It is appropriate and a common part of current civil procedure to state requested relief as part of an appeal.
- The final action of the BER would not be limited by this request.
- Parties should be allowed to amend or supplement the requested relief.

**Issue:** *Should the petitioner describe steps that it believes may allow for resolution of the appeal without a hearing?*

**Areas of Consensus:**

- It is appropriate and a common part of current civil procedure to describe steps that may allow for resolution of the appeal.
- Any settlement agreed to by the parties would not be limited by this request.
- Parties should be allowed to amend or supplement the described steps for resolution of the appeal.

**Issue:** *Should a disclosure statement be submitted by DEQ and other participating parties within 15 days of receipt of the petitioner's statement?*

**Area of Consensus:**

- Requirements applied to the appellant should also be applied to other parties, including the applicant and DEQ.

**Issue:** *Should discovery be limited?*

**Areas of Consensus:**

- Discovery should not be a "fishing expedition".

**Areas of Disagreement:**

**Proponents' Positions:**

- Discovery should be limited to that information that has a direct bearing on issues identified in the petitioner disclosure statement.
- Discovery is the most expensive and time-consuming part of the appeal process, and limiting it will result in a timely conclusion of the appeal process.

**Opponents' Positions:**

- Discovery is critical to identifying relevant issues.
- Using the current, less stringent standard for discovery is adequate since attorneys are used to working together to avoid unreasonable discovery requests.

**Issue:** *Should there be only limited supplementation of the record?*

**Areas of Consensus:** Supplementation of the record should be relevant to the issues.

**Areas of Disagreement:****Proponents' Positions:**

- Excessive supplementation of the record is a concern.
- Supplementation should be limited to the record of what is being appealed.

**Opponents' Position:**

- Limiting supplementation of the record would affect due process rights.
- Because of the complex issues involved, citizens may need to supplement the record as information is gathered through discovery.

**Issue:** *Should there be a presumption that the BER, rather than a hearing officer, will take action on appeals?*

**Areas of Consensus:** The BER should remain involved and manage the appeal process. There would be a BER option to appoint a hearing examiner and establish a specific timetable for actions.

**Areas of Disagreement:****Proponents' Positions:**

- The BER should establish a hearing date at the next scheduled meeting and then set interim dates to meet the final deadline.
- It is important for the BER to hear the appeal, rather than a hearing examiner, since they may need to rehear the testimony if there is any controversy, which slows down the process.
- The BER attorney could handle motions, etc. for the BER between meetings at the direction of the chairman.

**Opponents' Position:**

- The BER may not be prepared to directly handle the amount of work involved in an appeal.

**Issue:** *Should the BER establish a schedule to issue a final order within 120 days of filing the appeal?*

**Areas of Consensus:** The BER should establish a reasonable date for final resolution of the appeal.

**Areas of Disagreement:****Proponents' Positions:**

- The legislature has established a policy through statute that air quality permit decisions be made in a timely manner.
- 120 days is twice the amount of time the DEQ has to review the application and make a final decision on the permit, so it should be plenty of time to consider an appeal.

**Opponents' Position:**

- 120 days is not sufficient time for the BER and involved parties to address complex appeals.